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Attorney for Counter-Claimant

PET Imaging of San Jose, LLC

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

PET IMAGING OF SAN JOSE, LLC, a
California limited liability company;

Counter-Claimant,

vs.

HEALTH IMAGING, INC, a New York
Corporation.

Defendant.

) Case No. C08-00154 JF

) **ANSWER TO COUNTER-CLAIM**

RELATED COUNTER-CLAIMS

Cross-Defendant PET Imaging of San Jose, LLC, answers the counter-claim of Health Imaging, Inc. as follows:

THE PARTIES

1. Admit Health Imaging is a corporation organized under the laws of the State of New York; deny on lack of information and belief the remaining allegations of paragraph 1.

2. Admit PET Imaging of San Jose, LLP (PET Imaging) is a limited liability company organized under the laws of the State of California, with its principal place of business located

1 in San Jose, California.

2 3. Admit this Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332.

3 **GENERAL ALLEGATIONS**

4 4. Admit that in the latter part of 2004, within the State of California Health Imaging
5 sought to purchase three California companies, PET Imaging of San Jose, LLC, PET Imaging
6 of Berkeley, LLC and PET Imaging of San Francisco, LLC (herein 'the proposed acquisition'),
7 and in the event of consummation of the proposed acquisition, members of the acquired
8 companies, including Bijan Farhangui, expected to receive their respective share of the
9 proceeds paid within the State of California. Except as otherwise expressly admitted elsewhere
10 in this Answer, all allegations in paragraph 4 are denied.

11 5. Admit that in connection with the proposed acquisition, PET Imaging of San Jose,
12 LLC, PET Imaging of Berkeley, LLC and PET Imaging of San Francisco, LLC provided their
13 financial statements (prepared by their bookkeepers in California) to Health Imaging. Except as
14 otherwise expressly admitted elsewhere in this Answer, all other allegations in paragraph 5 are
15 denied.

16 6. Except as otherwise expressly admitted elsewhere in this Answer, all allegations in
17 paragraph 6 are denied.

18 7. Admit that prior thereto, on or about July 29, 2004, PET Imaging of San Jose, LLC
19 and Health Imaging entered into a separate, unrelated joint venture whereby these two parties
20 agreed to jointly purchase a used Siemens 2 Slice PET/CT system at a discounted price and
21 split 50/50 the profits derived from resale or use of the system, pursuant to which in California
22 PET Imaging paid \$158,000 in trust to Health Imaging towards the purchase price of the
23 system and Health Imaging agreed to pay the balance (herein the "joint venture agreement")
24 and in October 2004 Health Imaging claimed to have purchased the system and agreed to

1 reimburse PET Imaging's "\$158,000 upon request":

2 "Health Imaging received a check in the amount of \$158,000 dated July
3 29,2004. These funds were allocated towards the purchase of a Siemens 2 Slice
4 PET/CT system along with Health Imaging's contribution of \$500,000. The
5 system was purchased through a private bank and will be available for
6 installation in January, 2005.

7 Should you choose not to go forward with the consummation of this purchase,
8 Health Imaging will reimburse your contribution of \$158,000 upon your
9 request."

10 Except as otherwise expressly admitted elsewhere in this Answer, all allegations in paragraph 7
11 are denied.

12 8. Admit PET Imaging of San Jose, LLC and PET Imaging of Berkeley, LLC hired
13 and paid certified public accountants to prepare audited financial statements, which audited
14 financial statements were given to Health Imaging in connection with the proposed acquisition
15 of the three California companies. Except as otherwise expressly admitted elsewhere in this
16 Answer, all other allegations in paragraph 8 are denied.

17 9. Except as otherwise expressly admitted elsewhere in this Answer, all other
18 allegations in paragraph 9 are denied.

19 10. Admit the proposed acquisition of the three California limited liability companies
20 was cancelled in or about December 2006-January 2007. Except as otherwise expressly
21 admitted elsewhere in this Answer, all other allegations in paragraph 10 are denied.

22 11. Admit the following:

23 (a) With respect to the \$158,000 held in trust by Heath Imaging for the joint
24 venture's purchase of the used Siemens 2-slice PET/CT system, on and after May 2006, PET
Imaging repeatedly demanded Health Imaging reimburse PET Imaging for the \$158,000;

(1) In response, on May 16, 2006 Health Imaging made the first partial
repayment in the amount of \$50,000 of the \$158,000;

1 (2) In response, on August 14, 2006 Health Imaging made the second partial
2 repayment in the amount of \$25,000 of the \$158,000;

3 (b) After Health Imaging's proposed acquisition of the three California companies
4 was cancelled in December 2006- January 2007, Health Imaging notified PET Imaging of
5 Health Imaging's attorneys' fees and accountants' fees incurred to conduct its due diligence
6 related to the proposed acquisition of PET Imaging of San Jose, LLC, PET Imaging of
7 Berkeley, LLC and PET Imaging of San Francisco, LLC;

8 (c) Thereafter, in response to PET Imaging's demand for reimbursement of the
9 \$158,000 paid pursuant to the parties' joint venture agreement, Health Imaging made a third
10 partial repayment to PET Imaging in the amount of \$10,000 of the \$158,000 held in trust by
11 Heath Imaging for the joint venture's purchase of the used Siemens 2-slice PET/CT system.
12 Except as otherwise expressly admitted elsewhere in this Answer, all other allegations in
13 paragraph 11 are denied.

14 12. Admit the following:

15 (a) According to Health Imaging it diverted all or a portion of PET Imaging's
16 \$158,000 held in trust for the joint venture's purchase of the Siemens 2-slice
17 PET/CT system to pay for Health Imaging's due diligence costs in connection
18 with Health Imaging's proposed acquisition of three California limited liability
19 companies;

20 (b) PET Imaging properly filed suit in 2008 seeking the following relief alleged in
21 the complaint:

22 (1) For general and special damages according to proof, including
23 reimbursement of the principle amount of \$158,000 (less sums repaid
24 to date), loss of use of \$158,000, loss of profits from the joint venture;

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(2) For an accounting of the contributions, assets, income, expenses and profits of the joint venture;

(3) For an order imposing a constructive trust on the contributions, assets, income, and profits of the joint venture and ordering Defendant to disgorge the contributions, assets, income, and profits of the joint venture;

(4) For prejudgment interest on all sums due Counter-Claimant at the rate of 10% per annum from July 29, 2004 or other applicable date(s);

(5) For court costs;

(6) For attorney's fees to the extent allowed by law;

(7) For punitive damages in an amount according to the discretion of the court; For a jury trial on applicable issues and claims;

(8) For such other and proper relief as the court deems just and proper;

Except as otherwise expressly admitted elsewhere in this Answer, all other allegations in paragraph 12 are denied.

**FIRST CLAIM
(Breach of Oral Contract)**

13. Except as otherwise expressly admitted elsewhere in this Answer, all other allegations in paragraph 13 are denied.

14. Except as otherwise expressly admitted elsewhere in this Answer, all other allegations in paragraph 14 are denied.

15. Except as otherwise expressly admitted elsewhere in this Answer, all other allegations in paragraph 15 are denied.

16. Except as otherwise expressly admitted elsewhere in this Answer, all other

1 allegations in paragraph 16 are denied.

2 17. Except as otherwise expressly admitted elsewhere in this Answer, all other
3 allegations in paragraph 17 are denied.

4 **SECOND CLAIM**
5 **(Promissory Estoppel)**

6 18. Except as otherwise expressly admitted elsewhere in this Answer, all other
7 allegations in paragraph 18 are denied.

8 19. Except as otherwise expressly admitted elsewhere in this Answer, all other
9 allegations in paragraph 19 are denied.

10 20. Except as otherwise expressly admitted elsewhere in this Answer, all other
11 allegations in paragraph 20 are denied.

12 **THIRD CLAIM**
13 **(Unjust Enrichment)**

14 21. Except as otherwise expressly admitted elsewhere in this Answer, all other
15 allegations in paragraph 21 are denied.

16 22. Except as otherwise expressly admitted elsewhere in this Answer, all other
17 allegations in paragraph 22 are denied.

18 23. Except as otherwise expressly admitted elsewhere in this Answer, all other
19 allegations in paragraph 23 are denied.

20 **AFFIRMATIVE DEFENSES**

21 PET Imaging asserts the following affirmative defenses and reserves the right to assert
22 additional affirmative defenses after further discovery or investigation. In asserting these
23 affirmative defenses, PET Imaging does not assume the burden to establish any fact or
24 proposition where that burden properly belongs to Counter-Claimant.

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FIRST AFFIRMATIVE DEFENSE
Statutes of Limitations

Counter-Claimant's claims against PET Imaging are barred, in whole or in part, by the applicable statutes of limitation.

SECOND AFFIRMATIVE DEFENSE
Failure to Perform Contractual Obligations

Counter-Claimant's claims against PET Imaging are barred, in whole or in part, by Counter-Claimant's failure to perform its contractual obligations to PET Imaging.

THIRD AFFIRMATIVE DEFENSE
Mistake of Law or Fact

Counter-Claimant's claims against PET Imaging are barred, in whole or in part, by mutual and/or unilateral mistake of law and mistake of fact.

FOURTH AFFIRMATIVE DEFENSE
Statute of Frauds

Counter-Claimant's claims against PET Imaging are barred, in whole or in part, by the Statute of Frauds, which is codified in California as Civil Code § 1624.

FIFTH AFFIRMATIVE DEFENSE
Good Faith

Counter-Claimant's claims against PET Imaging are barred, in whole or in part, because PET Imaging acted at all times in good faith, without knowledge of any alleged wrongdoing and without a basis for such knowledge.

SIXTH AFFIRMATIVE DEFENSE
Reasonable Conduct

Counter-Claimant's claims against PET Imaging are barred, in whole or in part, because PET Imaging's alleged conduct has been reasonable, based upon independent, legitimate business and economic justifications, and without any wrongful purpose or effect.

SEVENTH AFFIRMATIVE DEFENSE
Justification/Privilege

Counter-Claimant's claims against PET Imaging are barred, in whole or in part, because PET Imaging's acts and omissions were justified and/or privileged under statutory and common law.

EIGHTH AFFIRMATIVE DEFENSE
Excuse

Counter-Claimant's claims against PET Imaging are barred, in whole or in part, by Counter-Claimant's own acts and omissions, which prevented and/or excused PET Imaging's performance.

NINTH AFFIRMATIVE DEFENSE
Waiver/Estoppel

Counter-Claimant's claims against PET Imaging are barred, in whole or in part, by the doctrines of waiver and/or estoppel.

TENTH AFFIRMATIVE DEFENSE
Release

Counter-Claimant's claims against PET Imaging are barred, in whole or in part, by Counter-Claimant's release of its claims.

ELEVENTH AFFIRMATIVE DEFENSE
Laches

Counter-Claimant's claims against PET Imaging are barred, in whole or in part, by the doctrine of laches because Counter-Claimant unreasonably delayed in asserting its claims against PET Imaging, and such delay substantially prejudiced PET Imaging.

TWELFTH AFFIRMATIVE DEFENSE
Unclean Hands

Counter-Claimant's claims against PET Imaging are barred, in whole or in part, by Counter-

1 Claimant's unclean hands.

2 **THIRTEENTH AFFIRMATIVE DEFENSE**
3 **Accord and Satisfaction**

4 Counter-Claimant's claims against PET Imaging are barred, in whole or in part, by the doctrine
5 of accord and satisfaction.

6 **FOURTEENTH AFFIRMATIVE DEFENSE**
7 **Ratification/Consent**

8 Counter-Claimant's claims against PET Imaging are barred, in whole or in part, by Counter-
9 Claimant's ratification and/or consent, express or implied.

10 **FIFTEENTH AFFIRMATIVE DEFENSE**
11 **California and New York Law**

12 Counter-Claimant's claims against PET Imaging are barred, in whole or in part, by operation of
13 provisions of the laws of the State of California and/or New York.

14 **SIXTEENTH AFFIRMATIVE DEFENSE**
15 **Speculative Damages**

16 The damages alleged in Counter-Claimant's complaint are remote and speculative; Counter-
17 Claimant is barred from the recovery of any such damages against PET Imaging in this action.

18 **SEVENTEENTH AFFIRMATIVE DEFENSE**
19 **Uncertainty**

20 Counter-Claimant is barred, in whole or in part, from recovering any damages or other relief by
21 reason of the uncertainty in the pleading of its causes of action and the alleged supporting facts
22 within its Complaint.

23 **EIGHTEENTH AFFIRMATIVE DEFENSE**
24 **Unjust Enrichment**

Counter-Claimant's claims are barred, in whole or in part, because the recovery of money by
Counter-Claimant through this action based on the complaint would constitute unjust
enrichment.

NINETEENTH AFFIRMATIVE DEFENSE

Failure to Mitigate

Counter-Claimant's claims against PET Imaging are barred, in whole or in part, by Counter-Claimant's failure to take reasonable and necessary measures to mitigate its damages, if any, and to protect its interests.

TWENTIETH AFFIRMATIVE DEFENSE

No Equitable Remedies

The Complaint and each claim contained therein are barred to the extent they purport to allege a cause of action seeking equitable remedies; any such remedy is barred by applicable law. In addition, Counter-Claimant's claims for equitable relief are barred because an adequate remedy is available at law.

TWENTY-FIRST AFFIRMATIVE DEFENSE

Set-Off or Offset

Defendant is entitled to a set-off or offset against any judgment awarded to Counter-Claimant, based on the allegations and prayer for relief set forth in PET Imaging's Counterclaim.

TWENTY-SECOND AFFIRMATIVE DEFENSE

Bad Faith

Health Imaging at all times dealt with PET Imaging in bad faith and acted with malicious, oppression, and fraud to damage or injure Counter-Claimant.

TWENTY-THIRD AFFIRMATIVE DEFENSE

Barred by Written Agreement

Health Imaging's claims are barred by the parties' written agreement of March 22, 2005 whereby each party agreed to bear its own costs, expenses, attorneys' fees and accountants' fees incurred in connection with the proposed acquisition.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

Misappropriation of Funds

By diverting PET Imaging's funds to pay Health Imaging's due diligence costs, Health

1 Imaging is guilty of misappropriation and diversion of funds held in trust.

2 **TWENTY-FIFTH AFFIRMATIVE DEFENSE**

3 **Reservation of Rights**

4 PET Imaging has not knowingly or intentionally waived any applicable defenses, and hereby
5 reserves the right to assert and rely on other applicable defenses as may become available or
6 apparent during discovery in this action. PET Imaging reserves the right to amend (or seek to
7 amend) its answer and/or affirmative defenses.

8 **PRAYER FOR RELIEF**

9 WHEREFORE, PET Imaging prays for judgment as follows:

- 10 1. For judgment in favour of PET Imaging of San Jose, LLC and against Health Imaging
11 on the Counter-Claim;
- 12 2. For a finding that Health Imaging misappropriated PET Imaging's funds held in trust
13 for the sole benefit and purpose of the joint venture and Health Imaginig breached its fiduciary
14 duty by diverting said funds to its own use as admitted in the Counter-Claim;
- 15 3. For a finding that the Counter-Claim was filed in bad faith with fabricated allegations
16 of a non-existent 'oral' agreement in "New York" and with findings that there is no factual or
17 legal merit to the Counter-Claim, there was no legitimate purpose for Health Imaging to file or
18 maintain the fabricated Counter-Claim, and for a finding that the true purpose of filing the
19 Counter-Claim was to unnecessarily delay the proceedings, unnecessarily increase the cost of
20 litigation, gain an unfair advantage in ADR proceedings, and discourage Counter-Claimant
21 from cost effectively pursuing its legitimate claims alleged in the Complaint, the factual basis
22 of which claims are conceded in the Counter-Claim;
- 23 4. For Sanctions for filing engaging in bad faith frivolous litigation tactics including
24 attorneys' fees incurred to defend the counter-claim to deter similar future misconduct;

1 5. For costs of suit herein;

2 6. For attorneys' fees to the full extent provided by law; and

3 7. For such other and further relief as the Court may deem just and proper.

4 In addition, PET Imaging hereby demands trial by jury on all claims triable to a jury.

5 DATED: May 1, 2008

CANNISTRACI LAW FIRM



By: _____

8 Sharonrose Cannistraci
9 Counsel for Counter-Claimant
10 PET Imaging of San Jose, LLC

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